STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2004
v	No. 242170 Oakland Circuit Court
RANDY WILLIAM HOLLAND, Defendant-Appellant.	LC No. 99-168368-FH

Before: Owens, P.J., and Schette and Borrello, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of third-degree criminal sexual conduct, MCL 750.520d(1)(c) (victim mentally incapable or incapacitated). Defendant was sentenced as a fourth habitual offender, MCL 769.12(1)(a), to 6 to 40 years' imprisonment. He appeals his conviction as of right and we affirm.

Defendant's only claim on appeal is that his due process right to a fair trial[1] was violated when the prosecutor argued facts not in evidence in her rebuttal closing argument. Defendant failed to make a timely and specific objection to the prosecutor's statements, so this issue is not preserved for review. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Unpreserved nonconstitutional claims are considered for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid issue forfeiture under the plain error doctrine, defendant must show that (1) an error actually occurred; (2) the error was plain (clear and obvious); and (3) the plain error affected his substantial rights. *Id.* This Court will only review unpreserved claims of prosecutorial misconduct if a curative instruction could not have alleviated any unfair prejudice to the defendant or if manifest injustice would result from failure to review the alleged misconduct. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000).

Claims of prosecutorial misconduct are reviewed on a case by case basis. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews the alleged misconduct in context by examining the pertinent portion of the record and considering the

[1] US Const, Am XIV; Const 1963, art 1, § 17.

conduct in light of the defense arguments to determine if the defendant was denied a fair and impartial trial. *Id.* at 272-273; *McAllister*, *supra* at 473.

In her rebuttal closing argument, the prosecutor noted that the victim took a bath before going to the hospital. The prosecutor then asked the jury:

> Isn't it conceivable to you that [the victim] took off her clothes, sat on her bed and got somebody else's hair in her pubic area, or that she got the hair in her public [sic] area in the hospital? I don't know.
>
> Defense counsel doesn't have to prove to you where the hair came from, but I don't either, but it certainly did not come from some other – one of [the victim's] many lovers.

Defendant claims on appeal that the evidence did not support the above remarks concerning the source of an unknown foreign head hair found among the hairs obtained from the victim. Evidence was presented that the victim took a bath on the morning of May 6, 1999. A forensic scientist testified that a person typically loses a hundred head hairs a day that are deposited where they walk or sit, and that these hairs get carried away on other people's clothing. The scientist further testified that unknown foreign hairs are often found when analyzing crime scene samples, although these hairs are found in less than ten percent of pubic combings. The scientist also testified that hospital personnel who had treated the victim were not asked for a hair sample to exclude them as potential sources of the unknown foreign hair. The nurse who conducted the pubic combing testified that she did not cover her hair when conducting the combing, but that no one ever complained to her that her hair was found in a rape kit. The victim testified that she had a boyfriend at the time of the trial, but that defendant was the only person with whom she had sexual contact. The prosecutor is permitted to argue reasonable inferences from the evidence presented at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). We find that it was reasonable for the prosecutor to suggest that the victim could have picked up the unknown foreign head hair from sitting undressed on her bed before or after her bath, or from the hospital, and not during sexual contact with anyone other than defendant.

Even if the prosecutor's comments had been improper, we also find that they were in direct response to the defense counsel's closing argument. Defense counsel suggested in her closing argument "that there is only one way that hair could have gotten in [the victim's] vaginal area and her public [sic] hair, inside her pants; that comes from sexual conduct and sexual conduct with somebody else, but it's not this man." In response, the prosecutor came up with reasons this foreign hair could have been found in the victim's pubic combing and thereby attempted to rebut defendant's claim that the hair came from another man during sexual contact. Because of their responsive nature, the prosecutor's comments do not constitute error requiring reversal. *Bahoda*, *supra* at 286; *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

We further note that any prejudice engendered by these comments could have been remedied by a curative instruction. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003); *McAllister*, *supra* at 473. We also find that any prejudice was in fact remedied by the trial court's instructions to the jury on the presumption of innocence and the burden of proof,

and that the statements and arguments of the lawyers are not evidence. See *Bahoda*, *supra* at 281; *Abraham*, *supra* at 276; *Callon*, *supra* at 330-331.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello